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Cherie Burkhalter, and Guardian Ad Litem of Robin Burkhalter, A Minor v. John Gunther : Respondent's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHERI BURKHALTER and
CHERI BURKHALTER,
Guardian Ad Litem of
ROBIN BURKHALTER, a minor,
Plaintiffs and Appellants,

Case No. 10369

vs.
GRANDEUR HOMES and
JOHN GUNTHER,
Defendants and Respondents.

RESPONDENTS' BRIEF

Appeal From the Judgment of the District Court
Salt Lake County
Honorable A. H. Ellett, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHERIC BURKHALTER and
ERIK BURKHALTER,
 Ad Litem of
ROBIN BURKHALTER, a minor,
 Plaintiffs and Appellants,

Case No. 10369

vs

ALEXANDER HOMES and
JOHN GUNTHER,
 Defendants and Respondents.

RESPONDENTS' BRIEF

STATEMENT OF NATURE OF CASE

The appellant Cherie Burkhalter in her own behalf and as guardian ad litem for her minor child appeals from an adverse judgment of the District Court of Salt Lake County in a case for the alleged wrongful death of her husband.

DISPOSITION IN LOWER COURT

The appellants brought suit in the District Court of Salt Lake County against the defendants claiming a right to damages because of the alleged negligence of the defendant John Gunther, causing the death of Leslie Terry Burk-

halter, husband and father to appellants. Due to a jury and based upon special interrogatories, a judgment of no cause of action was entered against the appellants.

RELIEF SOUGHT ON APPEAL

The respondents submit the judgment of the trial court should be affirmed.

STATEMENT OF FACTS

The respondents submit the following statement of facts:

At approximately 8:45 a.m. on May 14, 1984, Mr. Gunther, a corporate officer of Grand Junction, Inc., operating a 3 1/2-ton pick-up truck going south on State Street in Salt Lake County (R-27). He was on company business. The truck was painted white with black trim and had a big red "V" painted on the side (R-28). According to Mr. Gunther, there was lumber in the back of the truck which protruded about 4 feet beyond the rear of the truck (R-230). Other witnesses estimated 6 feet.

The day was cloudy and windy, but visibility was good and the pavement was dry. As Mr. Gunther approached Gordon Lane which runs east from State Street at 2400 South, he pulled over into the far left hand turn lane and signaled to make a left turn onto Gordon Lane (R-231). State Street in this vicinity is constructed so that a raised median separates north and southbound traffic (Ex D17). At the intersection with Gordon Lane there are three lanes of traffic on each side of State Street, and in addition a left turn lane on both the north and south side of Gordon Lane for collecting traffic so that left turns can be made from either side of State Street (Ex D17).

Gunther waited while one car passed, then saw that the path was clear and observing nothing which gave him any

the deceased attempted to make his left turn (R. 210). He was travelling away across the other lane of traffic when he was struck by Leslie Terry Burkhalter, travelling northbound in the right hand lane on State Street on a motorcycle (Ex. D17) and Mr. Ganther's truck (R. 211, 212, Ex. D17).

As a result of the impact practically demolished the motorcycle and caused severe damage to the truck at the point of impact. There was an imprint of the motorcycle headlight on the ground (Ex. D13, 9, 12, 13 and 14). The point of impact was 5 feet 4 inches from the north island and 10 feet 6 inches from the south island and 6 feet 8 inches from the east edge of Gordon Lane (R. 87-89). Although the appellants' witnesses put the deceased's speed at forty or 45 m.p.h., other witnesses, some familiar with motorcycle speeds, put his speed at over fifty and probably sixty m.p.h. (R. 241, 249). Mr. John Reich testified the deceased was "pushing" his motorcycle "real hard" (R. 249). The speed limit was posted at 40 m.p.h. As a result of the collision, the deceased was thrown into the bed of the truck and killed.

Officer Eugene C. VanRoosendaal testified that he measured 4 feet 6 inches of straight skid mark laid down by the deceased's motorcycle (R. 92). The deceased's motorcycle was a small English Triumph and was a racing type of motorcycle (R. 96).

Mr. Ganther said he first saw the motorcycle when it was 10 to 15 feet away (R. 211) and that when the motorcycle struck his truck which was after his truck had gone about 2 or 3 feet further, its wheels were just entering the gutter depression (R. 244). The motorcycle struck the truck to the rear (R. 244).

Mr. C. E. Sanoquist who was waiting for a stop sign on Gordon Lane said he saw no decrease in the deceased's

speed before impact, and that there was a full steering cycle behind the deceased's. R. 146, 247. Although one of the appellants' witnesses testified that the car swerved a little before impact, on cross-examination she admitted she could be wrong. R. 148. No one testified as to any deviation action by the car, and the skid mark was in a straight line. R. 92.

Based on the above evidence, the jury found the deceased's failure to keep a proper lookout was a proximate cause of the accident, and the Court entered a judgment for respondents. R. 265.

ARGUMENT

POINT 1

THE EVIDENCE SUSTAINS THE JURY'S FINDING THAT THE DECEASED FAILED TO KEEP A PROPER LOOKOUT AND THE COURT PROPERLY INSTRUCTED ON THIS MATTER.

The appellants contend that there is no evidence which the jury could have found that the deceased failed to keep a proper lookout in operating his motor car. On that contention, it is asserted that the jury verdict should be reversed.

At the outset, it should be remembered that the evidence must be viewed in a light most favorable to the verdict in determining whether there is any evidence on record to support the verdict, and also the Court's instructions. *Gordon v. Provo City*, 15 Utah 2d 237, 39 P.2d 1001 (1964); *Smith v. Callagov*, 16 Utah 2d 444, 40 P.2d 1002 (1965). When the evidence is so viewed, the jury verdict was appropriate.

The facts in this case show that as Mr. Gurtner approached the open area for a turn into Gordon Lane,

the appellant's flashing light signal which was properly placed. (R. 179, 216). He stopped at the opening in the curb on the island and his wheels were turned towards the left. He saw a car coming and stopped for it. (R. 180). He waited an additional three or four seconds, observing the road to be clear and present no danger, started his turn. (R. 210, 222). His turn was completed before he was struck by the deceased. The impact was 6 feet 8 inches from the east edge of street. (R. 211) and when the front wheels of the truck were entering the gutter depression in front of Gordon's motorcycle struck the rear of the truck. (R. 211). Several appellants argue the deceased kept a lookout and sought to change his direction, several factors belie this contention. First, Vera Riding who testified on direct examination that she thought there was some diversion said on cross examination she could be mistaken and appeared uncertain. (E. 133). Second, the skid mark from the deceased's vehicle was in a straight line. Third, Mr. Thomas Allen, who was a witness to the accident and testified for appellants, did not observe any deviation from a straight course. Also the motorcycle was not equipped with a windshield and there was no evidence that the deceased was wearing goggles to alleviate the effect of onrushing air on his vision. (E. 95, 101) which would make it difficult for him to keep an adequate lookout ahead.

The witnesses who saw Mr. Gunther's turn testified it was a slow turn. (R. 248), and further, he had traversed the first and most of the third when he was struck, thus supporting a conclusion that he was visible to oncoming traffic for some period of time. Additionally, he had paused at the signal flashing prior to turning. When these facts

are viewed in toto, it is apparent that respondent would have been visible for some time to any observer in the intersection who if he saw him enter the intersection, respondent would keep his vehicle under control in the intersection. Since the respondent's turn was very short, respondent traversed the greatest portion of the intersection and there would have been a reasonably long period in which respondent would have been visible and a hazard to approaching vehicles. If deceased's speed was 60 m.p.h. or even faster, respondent would have travelled a great distance in the time that he was approaching the respondent, respondent would have had opportunity to slow or change lanes. Deceased never appeared to remain constant up to the time of impact. R 249, which when coupled with the short distance marks for the high speed he was travelling, serves as evidence for the view that he was not observing the full intersection and probably did not see the truck until respondent entered the far lane.

Witnesses and the respondent testified that the sound of the deceased's motorcycle first attracted their attention, thus supporting the view that deceased was approaching the turn-off area at a high rate of speed, respondent indifferent or not observant of Mr. Ganther's "very slow turn." R 248. The presence of other motorcycles and the testimony of the high speed of deceased's vehicle supports an inference that he may have been racing and observing only with gun-barrel vision.

It is worth noting that, at the time of trial, respondent took no exception to Instruction No. 16 dealing with the lookout, thus supporting a conclusion that at that time

¹ See *People v. Feltz*, 1967-1, 37 Cal. 2d 673, 233 P.2d 425, 10 AFR2d 1007, 1008, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 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the jury's view of the evidence. Both parties were given the instruction. R. 38, 261.

This Court has, on numerous occasions, ruled that the duty of a driver to maintain a proper lookout is one for the jury. *Boyle v. Brown*, 3 Utah 2d 180, 281 P.2d 209. In the present case, the plaintiff had acted very much like respondent in the case in slowly traversing an intersection. He was a defendant when he had just about completed crossing through the intersection. The Court found that as a reasonable reason why the defendant could not have seen the other car and the jury could properly find a failure to keep a proper lookout.

Boyle v. Brown, *Carpenter*, 4 Utah 2d 378, 294 P.2d 788. The Court observed:

When two motor vehicles collide without a claim being interposed by the drivers that failure to keep a proper lookout has at least contributed to cause the mishap. As a consequence this court has many times considered the duty of a driver to keep such lookout under varying circumstances and conditions. Modern traffic complexities make it impossible to lay down by judicial rule what will always be, or fail to be, reasonable care in the operation of motor vehicles. The duty to keep a proper lookout is manifest but the obedience to or violation of that duty must be determined according to particular circumstance and in full accord with the constantly varying exigencies of reasoning each accident. As to what constitutes a proper lookout is usually, therefore, a latter-day classic question for jury determination, and each trial and appellate court must determine the question as a matter of law only when convinced that reasonable persons could not disagree upon the question when conscientiously applying fact to law."

Spackman v. Carson, 117 Utah 18, 204 P.2d 101 (1950) involved a truck-motorcycle collision. This Court held the question of lookout was for the jury. See also *Morrison v. Perry*, 104 Utah 151, 14 P.2d 100 (1943).

In *Martin v. Stevens*, 121 Utah 44, 14 P.2d 101 (1952), this Court considered the lookout question in an intersection case. The facts of that case bear comparison with those in the instant case except plaintiff was injured here and deceased here like the motorcyclist in the other case. This Court reversed the trial court ruling saying the question of contributory negligence was for the jury. The Court observed:

"The question of contributory negligence was for the jury and the court should be reluctant to remove consideration of this question of fact from it. See *Mauchley*, 115 Utah 68, 202 P.2d 347 (1948); *Estate v. Union Pacific Railroad Co.*, 121 Utah 239 P.2d 163. The expressions in those cases are in accord with this uniformly accepted doctrine: the right to trial by jury should be safeguarded. But the issue of contributory negligence may be taken from the jury, the defendant's burden of proving that plaintiff was guilty of contributory negligence proximately contributed to cause his own injury may be met, and established with such certainty that reasonable minds could not find to the contrary. Conversely, if there is any reasonable basis, either from lack of evidence, or from the evidence and the inferences arising therefrom, taken in the light most favorable to plaintiff, upon which reasonable minds may conclude that they are not convinced by the preponderance of the evidence either that plaintiff was guilty of such negligence proximately contributed to his injury, the plaintiff is entitled to have the question submitted to a jury."

appellate court in this case to the above rules, it seems that the trial court acted properly in submitting the case to the jury and that their judgment must stand.

POINT II

THE JURY'S INSTRUCTIONS ON VEHICLES MAKING LEFT TURNS WAS ADEQUATE AND IN VIEW OF THE FACTS, AS SETS TO INTERROGATORIES, NOT REVERSIBLE.

The appellants contend that the trial court committed error in Instruction No. 13, R. 35.

As previously submitted that the appellants could not show prejudice by the instruction given. Instruction No. 13 dealt with the duty of the driver making the left turn and the duty of one approaching a person making a left hand turn to yield the right-of-way. In the instant case, the jury found the respondent Gunther had not kept a proper lookout. R. 265. Thus, the jury found that Gunther was negligent in violating the requirement of an improper lookout as instructed upon in instruction 13. Thus, assuming that the trial court's instruction was less favorable than appellants deserve in, as appellants argue it "precluded arguing to the jury the continuing and increasing duty on the part of Mr. Gunther," the jury still found Gunther negligent under the instructions given and hence no prejudice resulted.

It is submitted that the instruction as given adequately stated the duty of the applicable standard if Instruction No. 13 read with Instruction 14 defining the term "immediately." The appellants' argument seems to be: 1) that the jury somehow was not aware that the left turn vehicle must observe prior to making and during the turn,

¹ The jury found that Gunther had failed to keep a proper lookout, appellants' contention that the jury was not aware of this duty is not supported.

and 12 that the jury was not aware of the time when the question of immediate hazard against the right of the turn

As to the first contention, the Court's charge clearly advises the jury that the time for making the decision as to when an immediate hazard exists is when the turn is to be "commenced." Further, when Instruction 13 is read with Instruction 14, it appears that the jury's legal duty is created at the time the vehicle seeking to make a turn "approaches an intersection." Obviously, the jury was properly apprised of when the hazard must appear. If the jury could have found there was no duty to yield to the hazard "before" turning simply is not expansive of appellants' brief. Appellants' major objection seems to be the failure to give the instruction in the exact language of J.I.F.U., 21-20. However, it appears that an analogy between J.I.F.U. 21-20 and Instructions 13 and 14 as given to the Court shows they are comparable, and that if viewed under a more expansive definition of "immediate hazard" as given by the Court, the jury was adequately apprised.

As to appellants' second contention that the jury did not appreciate the need for the duty to extend throughout the full time of the turn, it is equally obvious the instructions were adequate. The jury was given the verbatim language of 41-6-73, UCA, 1953. Thus, they were told that the question of immediate hazard is to be judged "during the time when such driver is moving within the intersection." In *Smith v. Gallegos*, 16 Utah 2d 344, 400 P.2d 571 (1965), this Court observed:

"... 'during the time when such driver is moving within the intersection.' The addition of the language 'during the time when such driver is moving within the intersection' quoted clearly places a greater duty on the driver in that he must yield not only to approaching vehicles

...to constitute a hazard prior to beginning the turn, as to vehicles which will constitute a hazard while the time he is moving within the intersection, which includes the time it will be necessary for him to complete his turn."

The court emphatically emphasized the statutory language as being "clearly unambiguous." Since the jury was given the correct instructions in clear context, they were most adequately apprised of the applicable standard and apparently properly evaluated the standard. Further, it should be noted that no exception was taken by appellants to Instruction No. 10 which defined "immediate hazard" which is the language of the statute.

When the instructions given are taken as a whole, it is apparent they were adequate. *Brooks v. Utah Hotel Co.*, 100 P.2d 127 (1946). There was no deviation from the rules applicable in left turn cases, *Hayden v. City of Salt Lake*, 2d 171, 263 P.2d 796 (1953), and no objection by appellants holds an instruction like that given here to be erroneous let alone prejudicial where the jury actually found negligence against the turning party.

POINT III

THE COURT DID NOT COMMIT ERROR IN SUBMITTING THE MATTER TO THE JURY ON SPECIAL INTERROGATORIES.

The court submitted the issues in the case to the jury on special interrogatories. The Court advised the jury prior to the trial of the case that he intended to submit the matter on special interrogatories where they would be asked questions as to liability and damages (R. 103-104). No objection of any kind was taken to the Court's remarks, and the Court did as it was preview its intentions. If appel-

lants felt the remarks improper, they could have moved to set aside or excepted. *Hilly v. Clover Rd.*, 14 Utah 2d 100, 101, 396 P.2d 100, 101 (1962).

"If something occurs which party feels is prejudicial to him that he should object to a fair trial, he must object promptly, and if he does not, he waives whatever rights may have to do so."

It is obvious that the comments of the Court were neither harmful or confusing, nor did they lean in any way to either party.

Appellants also argue the Instruction 15 should have been given. No exception was taken to Instruction 15. The failure of the appellants to except to the instruction they deemed it improper precludes the contention on appeal. *Employers Mutual Liability Ins. Co. v. Oil Co.*, 123 Utah 253, 258 P.2d 445 (1953), R.C.P. U.R.C.P.

It is obvious that there is no merit to the appellants' contention on this point. The Court has clear discretion to admit a case to the jury on special interrogatories. R.C.P. U.R.C.P. If appellants had felt the questions asked they should have expressed their concern. *Baker v. ...*, 6 Utah 2d 161, 308 P.2d 264 (1956). Obviously they did not do so because the questions were direct and easily understandable. The special verdict, R. 69, merely asked the jury to determine what acts of either party involved in the proximate cause of the accident, and to appraise Burkhalter's damages without reference to liability. This was in accordance with Instruction 19 and a proper procedure to avoid unnecessary trials if there is some truth

the contributory negligence issue from that determined by the jury. Nor does it appear the jury was confused as to the proper response to the special verdict found in favor of contributory negligence," thus finding no error. The jury had merely failed to specify the amount of contributory negligence took. There is no evidence the jury was confused. Indeed, Instructions 10 and 11 told a jury to consider damages and contributory negligence. We submit that no error exists on this point.

POINT IV

THE COURT SHOULD NOT INTERFERE WITH THE JURY'S VERDICT.

The Court claims that the trial judge made the same error as in *Liberton's*, 16 Utah 2d 145, 406 P.2d 64. In that case, the Court reversed because the court had the jury brought into their box and requested to assist in their deliberations. Thus, the Court examined the verdict and found it was incomplete. The trial judge then resubmitted the matter to the jury and *that the jurors raise their hands in open court to their vote on an unanswered interrogatory*. The jurors were also polled as to the other questions they received, and when the Court found, upon a showing that they were in disagreement returned them to the room. This Court reversed, finding that by requiring jurors to disclose their verdict and voting in open court, the right to privacy was invaded. No such thing happened in the instant case.

The trial judge was well aware of the *Cornia* case since it was mentioned in the briefs. In this case, when the jury was being asked if a verdict had been reached and

was informed that it had. Thus, in this case, the jury returned to the courtroom because they had reached a verdict. R. 263. In *Cornia*, they had not. In this case, the interrogatories were answered; in *Cornia*, they were not. The foreman of the jury in this case informed the Court that all eight jurors had agreed. R. 263. Upon announcement of the verdict, it appeared that the information requested under 1. b), although clear as to the question and finding, had not been detailed. The Court read the verdict to the foreman and advised him that only as found could be inserted, but only if they had been agreed on. The foreman wrote in the language apparently agreed on before, and verdict was passed to each juror and read to the Court where it was read. No juror was asked to stand, hand or otherwise announce his vote in public. There had been reached before, and only the form of the verdict was at issue. Consequently, this case in no way has the characteristics of the *Cornia* case.

Further, the appellants never voiced any objection or took exception to the Court's action. Certainly, if the appellants felt there was some prejudice or injustice or impropriety, they should have objected. Clearly, there was none. No juror indicated his vote or was coerced into a vote nor does it appear the deliberate process had not occurred.

It does not appear that the appellants were prejudiced in any manner. In *Domann v. Pence*, 183 Kan. 135, 139, 321 (1958), the Court stated the jury's misconduct or impropriety would not warrant reversal in the absence of specific prejudice. If any error was involved in the trial case, it was clearly harmless, and, since substantial justice was done, reversal is not warranted. Rule 61, U.R.C.P.

CONCLUSION

This case presented a jury question. The jury rendered a verdict not adverse to appellants. An examination of the record reveals that the evidence supports the verdict. Appellants had their day in court, and were given a fair trial. The Court should affirm.

Respectfully submitted,

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